

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 409 of 1976

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

PATHAN MOHMEDKHAN RASULKHAN

Versus

KALU NATHU HARIJAN

Appearance:

MR SK BUKHARI for Petitioners

SERVED for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 08/01/97

ORAL JUDGEMENT

1. This is a Second Appeal under section 100 of CPC wherein the appellants are the original plaintiffs and appellants in the lower appellate court, whereas the respondents are the original defendants and respondents in the lower appellate court.
2. The plaintiffs had filed a suit in respect of survey nos. 15 and 16 situated in the sim of village

Kachhotia Muvada, near Lunawada in taluka Lunawada. Survey no.15 admeasures about 2 acres and 21 gunthas and survey no.16 admeasures about 5 acres and 20 gunthas, both being contiguous to each other. The plaintiffs' case was that the lands of these survey numbers are being used as Kabrastan by Muslims, and the said lands belong to a trust known as Muslim Kom Musafarkhana Kabrastan and Masjid, and that the said trust has been registered under the provisions of the Bombay Public Trusts Act. The plaintiffs asserted that the defendant had no right of possession or enjoyment of the said lands, and that no community except Muslims could utilize any portion of the said land for burial.

2. The trial court, after appreciating the evidence on record, recorded findings of fact to the effect that the plaintiffs have proved that they are the trustees of a Public Charitable Trust registered under the Bombay Public Trusts Act, that the plaintiffs have proved the ownership of the said trust in respect of survey no.15 and a part of survey no.16 (except one acre of survey no.16 abutting on Veri river), that the defendants have proved that the Bhangi and Harijan community enjoys the rights of burial on one acre of survey no.16 abutting on Veri river etc. Other findings of fact recorded by the trial court were in favour of the plaintiffs and therefore, the same need not be discussed any further. The trial court therefore, granted a declaration and injunction as prayed for (under the amended plaint) in favour of the plaintiffs so far as the survey no.15 and the major part of survey no.16 are concerned, and excluded one acre out of survey no.16 abutting on Veri river from such declaration and injunction, since the defendants had asserted and proved their right of burial in respect of this smaller strip of land forming part of survey no.16.

3. The plaintiffs being aggrieved by that part of the judgment and decree of the trial court whereby one acre out of survey no.16 was excluded from the decree, preferred an appeal under section 96 of CPC to the lower appellate court. The lower appellate court, after reappraisal of the evidence on record, confirmed the judgment and decree of the trial court. It may be mentioned here that while doing so, the lower appellate court reversed one of the findings in favour of the plaintiffs recorded by the trial court as regards the fact of not joining a Charity Commissioner as a party to the suit. However, the lower appellate court also found that so far as the plaintiffs' suit is concerned, looking to the various grounds and the reliefs sought therein,

the absence of the Charity Commissioner as a party to such suit would not make any difference. Although technically, this may be regarded to be a reversal of a finding by the lower appellate court, the said finding is not adverse to the interest of the plaintiffs-appellants, and I therefore, do not propose to discuss the same herein.

3.1 So far as the rights of the plaintiffs claimed and asserted in respect of survey no.15 are concerned, the trial court had granted the decree in favour of the plaintiffs as prayed for, and this was confirmed by the lower appellate court. Thus, the appellants herein (original plaintiffs), are not aggrieved by the decree in respect of survey no.15.

3.2 The lower appellate court, then reappreciated the entire evidence in respect of survey no.16, wherein appellants-plaintiffs had asserted their exclusive right to possession and user for the purposes of burial by the Muslim community, in respect of the entire survey number, whereas the defendants had contested the said right and had asserted the similar right in respect of a part of the said survey number. As mentioned hereinabove, the trial court had found in favour of the plaintiffs, and had decreed the suit even in respect of survey no.16, except a portion thereof, admeasuring one acre abutting on the Veri river.

3.3 The lower appellate court, after reappreciating the evidence on record, came to similar conclusion and confirmed the decree of the trial court even in respect of survey no.16.

3.4 The appellants herein, have therefore, preferred the present appeal in respect of the reliefs which have been refused by the courts below in respect of this one acre abutting on the Veri river, out of survey no.16.

3.5 In the context of this controversy, it is necessary to examine the scope of the present appeal under section 100 CPC, and the powers of this Court while exercising jurisdiction as a second appellate court.

4. The scope of section 100 CPC, and the powers of the High Court while exercising jurisdiction as a second appellate court are by now well defined and require no detailed discussion. The Supreme Court has, in the case of Ramaswamy Kalingaryar Vs. Mathayan Padayachi (AIR 1992 Supp (1) SCC page 712), and in the case of Parsini (dead) through Legal Representatives Vs. Atma Ram (AIR

1996 SC 1558), clearly reiterated the principle that the High Court cannot, while functioning as a second appellate court under section 100 CPC, upset the findings of fact recorded by the lower appellate court by reassessing the evidence, or reassess the qualitative value of such evidence on record, and thus cannot reverse such findings of fact. In fact, the High Court cannot interfere with such findings of fact even by examining or reappreciating the evidence from the aspect of " sufficiency of proof".

5. In view of this clear position in law, I am of the opinion that no substantial question of law arises in the present appeal. The only question on which there is any controversy is as to whether it is the plaintiffs or the defendants who have established their right to bury the dead bodies of the members of their community on that one acre out of survey no.16 abutting on the Veri river. It is clearly seen from the discussion of the evidence on record, and it could not be pointed out to the contrary by the learned counsel for the appellant, that this appeal is nothing but another attempt at re-appreciation of the evidence on record, and the consequential findings of fact. Obviously, this Court cannot interfere with the findings of fact, even on the ground of " sufficiency of proof".

6. In the premises aforesaid, the judgment and decree of the lower appellate court are required to be confirmed and the present appeal is therefore, dismissed with no order as to costs.

Amp/-